



EUROPEAN COMMISSION
DIRECTORATE-GENERAL
HUMAN RESOURCES AND SECURITY
The Director-General

Brussels, 8 June 2021
HR/GI

Ms Lili Bayer
POLITICO Europe
Rue de la Loi 62
1040 Bruxelles
Belgium

By email: ask+request-9367-
4ae60a3f@asktheeu.org

Subject: Your application for access to documents – Ref /GestDem No 2021/2639

Dear Ms Bayer,

I refer to your e-mail, dated 22 April 2021 registered the same date under reference number 2021/2639, in which you make a request for access to documents.

You request *“documents which contain the following information:*

A detailed description of the restrictions the European Commission has imposed on Carles Esteva Mosso, who is leaving DG Competition to work in a law firm.”

I understand that your request refers to documents in which the Appointing Authority takes a decision relating to the new role and new professional activity of Mr Carles ESTEVA MOSSO after leaving the service in line with Article 16 of the Staff Regulations¹ (SR), as it is in that decision where possible restrictions (if any) are to be described.

In this context, the document identified in the framework of your request is:

- a decision of the Appointing Authority of 9 April 2021 concerning the declaration of the intention to engage in an occupational activity submitted by Mr Esteva Mosso, registered under reference Ares(2021)2442540 in the framework of Article 16 SR (hereafter “the requested document”).

¹ Consolidated text: Regulation No 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community

I have examined your request under the provisions of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (“Regulation 1049/2001”).

1. ASSESSMENT AND CONCLUSIONS

Regulation 1049/2001 provides that any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, subject to the principles, conditions, and limits defined in the Regulation.

According to its Article 2(3), the Regulation *"shall apply to all documents held by an institution, that is to say, documents drawn up or received by it and in its possession"*. According to its Article 3(a), a document is *"any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audio-visual recording) concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility"*.

I regret to inform you that I have to refuse access to the requested document, based on the exception laid down in Article 4(1)(b) (protection of privacy and the integrity of the individual).

The detailed reasons underpinning my assessment are set out below.

Protection of privacy and the integrity of the individual and transmission of personal data

Article 4(1)(b) of Regulation 1049/2001 provides that *"[t]he institutions shall refuse access to a document where disclosure would undermine the protection of [...] privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data"*.

In accordance with paragraph 1 of Article 26 SR, which aims inter alia to safeguard the privacy and integrity of present and former Commission staff, the 'personal file' of an individual includes:

- a) all documents concerning his administrative status and all reports relating to his ability, efficiency and conduct;
- b) any comments by the official on such documents.

As is obvious from the title of the requested document, it forms part of the personal file of the official concerned, which contains the documents concerning his administrative status. The requested document, forms part of the personal file of the staff member concerned as it concerns the decision of the Appointing Authority regarding the new occupational activity of Mr Esteva Mosso after leaving the service.

In accordance with paragraph 8 of Article 26 SR, *"[t]he personal file shall be confidential and may be consulted only in the offices of the administration or on a secure electronic medium"*. It is clear from this provision, that the European Commission is bound to protect the content of its staff member's personal file in an enhanced way.

I also note that the case-law of the EU Courts on public access to documents holds that in the absence of express provisions in Regulation 1049/2001, which would provide for its primacy over other regulations relating to a particular area of Union law (such as, e.g., the Staff Regulations), it is necessary to ensure such an application of each of the two set of rules, which is compatible with that of the other².

In the light of the above, I consider that the requested document as a whole fall under the scope of the exception provided in Article 4(1)(b) of Regulation 1049/2001, which must be interpreted taking into account the principle of confidentiality of the personal files of members of the staff provided under Article 26 SR. Consequently, I consider that the disclosure to the public of the document falling under the scope of your request would seriously undermine the privacy of the individual concerned within the meaning of Article 4(1)(b) of Regulation 1049/2001.

Moreover, I consider that public disclosure of the requested document would infringe the legislation regarding the protection of personal data under the provisions of Regulation (EU) No 2018/1725 of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data (“Regulation 2018/1725”).

In case C-28/08 P (EC v Bavarian Lager)³, the Court of Justice ruled that when a request is made for access to documents containing personal data, Regulation 2018/1725 becomes fully applicable⁴.

Article 3(1) of Regulation 2018/1725 provides that personal data “*means any information relating to an identified or identifiable natural person [...]*”.

As the Court of Justice confirmed in case C-465/00 (Rechnungshof)⁵, “*there is no reason of principle to justify excluding activities of a professional [...] nature from the notion of private life*”. The notion of personal data covers both the factual elements concerning the professional activity of the staff member concerned as well as the final decision concerning his declaration of intention to engage in an occupational activity. In addition, the names of the person concerned as well as other data from which their identity can be deduced undoubtedly constitute personal data in the meaning of Article 3(1) of Regulation 2018/1725.

Therefore, the requested document as a whole falls under the scope of the exception provided in Article 4(1)(b) of Regulation 1049/2001, which must be interpreted taking into account Regulation 2018/1725.

² See judgment of 12 November 2015 in joined cases T-515/14 and T-516/14, *Alexandrou v Commission*, ECLI:EU:T:2015:844, paragraphs 69, with further references.

³ Judgment of 29 June 2010, C-28/08 P, *European Commission v The Bavarian Lager Co. Ltd*, ECLI:EU:C:2010:378, paragraph 59.

⁴ This judgment specifically cited Regulation 45/2001, which was repealed by Regulation 2018/1725. In accordance with Article 99 of that latter Regulation, references to Regulation 45/2001 should be construed as references to Regulation 2018/1725. However, please note that the case law issued with regard to Regulation 45/2001 remains relevant for the interpretation of Regulation 2018/1725.

⁵ Judgement of 20 May 2003 in oined cases C-465/00, C-138/01 and C-139/01, *Rechnungshof v Österreichischer Rundfunk and Others, Neukomm*, and, *Lauermann v Österreichischer Rundfunk*, ECLI:EU:C:2003:294, paragraph 73.

Pursuant to Article 9(1)(b) of Regulation 2018/1725, “*personal data shall only be transmitted to recipients established in the Union other than Union institutions and bodies if [...] [t]he recipient establishes that it is necessary to have the data transmitted for a specific purpose in the public interest and the controller, where there is any reason to assume that the data subject’s legitimate interests might be prejudiced, establishes that it is proportionate to transmit the personal data for that specific purpose after having demonstrably weighed the various competing interests*”.

Only if these conditions are fulfilled and the processing constitutes lawful processing in accordance with the requirements of Article 5 of Regulation 2018/1725, can the transmission of personal data occur.

In case C-615/13 P (ClientEarth)⁶, the Court of Justice ruled that the institution does not have to examine by itself the existence of a need for transferring personal data. This is also clear from Article 9(1)(b) of Regulation 2018/1725, which requires that the necessity to have the personal data transmitted must be established by the recipient.

According to Article 9(1)(b) of Regulation 2018/1725, the European Commission has to examine the further conditions for the lawful processing of personal data only if the first condition is fulfilled, namely if the recipient establishes that it is necessary to have the data transmitted for a specific purpose in the public interest. It is only in this case that the European Commission has to examine whether there is a reason to assume that the data subject’s legitimate interests might be prejudiced and, in the affirmative, establish the proportionality of the transmission of the personal data for that specific purpose after having demonstrably weighed the various competing interests.

In your request you did not establish the necessity of having the data transferred. Consequently, I conclude that, pursuant to Article 9(1)(b) of Regulation 2018/1725, access cannot be granted to the personal data, as the need to obtain access thereto for a purpose in the public interest has not been substantiated in your request.

2. PARTIAL ACCESS.

While I have also considered the possibility of granting partial access on the basis of Article 4(6) of Regulation 1049/2001, I have concluded that this would equally undermine the protection of personal data. It follows from the assessment made above that the requested document is manifestly and entirely covered by the exception laid down in Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation 1049/2001. Also, no meaningful partial access could be granted since you requested a document concerning a clearly identified natural person.

3. TRANSMISSION OF INFORMATION ON PERSONAL DATA

Against this background, in order to try address your query to the extent possible, I have also considered the possibility of sharing with you some additional general information on the process to which your request relates. However, as explained above, information on the decision pursuant to Article 16 SR by the Appointing Authority regarding Mr

⁶ Judgement of 16 July 2015, C-615/13P, *ClientEarth and Pesticide Action Network Europe (PAN Europe) v European Food Safety Authority*, ECLI:EU:C:2015:489, paragraph 47.

Esteva Mosso is considered personal data, therefore the sharing of it has to respect the provisions for the transmission of personal data pursuant to Regulation 2018/1725.

In your request, you did not establish the necessity of having the data transferred for a specific purpose in the public interest, which constitutes the first condition to be met pursuant to Article 9(1)(b) of Regulation 2018/1725. As per established case law (Case C-615/13 P ClientEarth), the Commission does not have to examine by itself the existence of a need for transferring personal data. As the necessity has not been established in your request, the Commission does not have to examine the second condition foreseen in Article 9(1)(b) of Regulation 2018/1725, whether the data subject's legitimate interests might be prejudiced and the proportionality of such transmission.

Consequently, I conclude that, pursuant to Article 9(1)(b) of Regulation 2018/1725 no information related to the above-mentioned decision regarding Mr Esteva Mosso can be provided, as any such information constitutes personal data and the need to obtain access thereto for a purpose in the public interest has not been substantiated in your request.

4. MEANS OF REDRESS.

In accordance with Article 7(2) of Regulation 1049/2001, you are entitled to make a confirmatory application requesting the European Commission to review this position.

Such a confirmatory application should be addressed within 15 working days upon receipt of this letter to the Secretary-General of the Commission at the following address:

European Commission

Secretariat-General

Transparency, Document Management & Access to Documents (SG.C.1)

BERL 7/076

B-1049 Bruxelles

or by email to: sg-acc-doc@ec.europa.eu

Yours sincerely,

(e-signed)

Gertrud INGESTAD